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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 928

IN THE MATTER OF

ARMAND SCHMOLL, INC., *Petitioner,*

v.

THE FEDERAL RESERVE BANK OF NEW YORK, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of Mr. Justice Samuel I. Rosenman, rendered at Special Term, Part I, of the Supreme Court of New York, New York County, on June 12, 1939 (R. 28-29), is not officially reported. Mr. Justice Rosenman's decision was unanimously affirmed by the Appellate Division of the Supreme Court, First Department, without opinion, 260 App. Div. 912 (R. 32), on November 8, 1940. The Appellate Division granted leave to appeal to the New York Court of Appeals, 260 App. Div. 1006 (R. 32-33), which thereafter

affirmed the decision below. The opinion of the Court of Appeals (R. 34-51), rendered October 16, 1941, is reported in 286 N. Y. 503.

Jurisdiction

The order of the Supreme Court of New York on remittitur from the Court of Appeals was entered October 21, 1941 (R. 53). The petition for a writ of certiorari was filed February 6, 1942, time to apply for such writ having been extended by orders of this Court to February 7, 1942. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925.

Respondent suggests that the basis for invoking the jurisdiction of this Court has not been established because it does not appear affirmatively from the record that a Federal question was actually decided by the New York Court of Appeals or that the judgment as rendered could not have been given without deciding it. The New York Court of Appeals is the ultimate authority as to what remedies are provided by the constitution and laws of New York State. The Court of Appeals has indicated in the prevailing opinion in this case, not only that it regarded as controlling the decisions of this Court to the effect that a State court does not have the power to mandamus a Federal officer, but also that it approved of this principle as a matter of governmental policy. The Court said (R. 37):

> "Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution."

Petitioner itself argues at page 50 of its brief that the question presented by the petition is in effect one of State law. The determination by the Court of Appeals of a question of State law is conclusive on all courts and peti-

tioner's contention that "This Court should say to the New York Supreme Court that it *must* determine and apply its own remedies" is fallacious. *Smith* v. *Adsit*, 16 Wall. 185, 189; *St. Louis, Iron Mountain and Southern Ry. Co.* v. *Taylor*, 210 U. S. 281, 285.

If, however, this Court should consider that a Federal question was necessarily decided by the New York Court of Appeals, the petition for a writ of certiorari in this case should be denied because the only question presented has heretofore been determined by this Court and the decision of the Court of Appeals is clearly in accord with applicable decisions of this Court which have stood over a period of many years without any express or implied dissent.

Statement

Section 522(c) of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, Title IV; 46 Stat. 739; 31 U. S. C. A. § 372) provides that the Federal Reserve Bank of New York shall determine the buying rates in the New York market for cable transfers[1] payable in foreign currencies and, in any case where there are no market buying rates for such cable transfers, shall calculate such rates, and shall certify such buying rates daily to the Secretary of the Treasury who shall make them public at such times and to such extent as he deems necessary. Such rates are certified for use in converting foreign currency into currency of the United States for the purpose of the assessment and collection of duties upon merchandise imported into the United States.

On certain dates in 1935 and 1936, the Federal Reserve Bank of New York, acting under Section 522 of the Tariff Act of 1930, certified to the Secretary of the Treasury cer-

[1] A "cable transfer" may be defined as an order transmitted by cable to pay a certain sum of money to a designated payee. Djorup, "Foreign Exchange Accounting" 1926, ed., p. 44; *Oshinsky* v. *Taylor*, 172 N. Y. Supp. 231, 232 (App. Term 1st Dept. 1918); and see *Strohmeyer & Arpe Co.* v. *Guaranty Trust Co.*, 172 App. Div. 16, 19 (1st Dept. 1916).

tain rates of exchange for Brazilian milreis, which rates were published by the Secretary of the Treasury in Treasury Decisions 48064, 48100 and 48155 and were used by the Collector of Customs at the Port of New York, pursuant to this Section, in assessing the customs duties upon hides imported by the petitioner from Brazil. In March 1939 the petitioner sought to obtain an order of the courts of the State of New York in the nature of a writ of mandamus directing the bank to certify *nunc pro tunc* new and different rates of exchange for the milreis on the dates in question. Respondent did not answer the petition but applied for an order under Section 1293 of the New York Civil Practice Act dismissing the petition on four specific objections in point of law (R. 19-20). Although the properly pleaded statements of fact set forth in the petition were deemed admitted for the purpose of such application, the many conclusions of law and characterizations of respondent's acts which are included in the petition were not, of course, to be taken as true.

The New York Court of Appeals has affirmed the order dismissing the petition and held that the New York courts do not have jurisdiction of the subject of such a proceeding.

Question Presented

The only question presented is whether the courts of the State of New York have jurisdiction to direct or control by mandamus the performance by Federal Reserve Bank of New York, acting as a Federal agency, of its specific governmental function under Section 522(c) of the Tariff Act of 1930.

Statutes Involved

Section 522 of the Tariff Act of 1930 (Act of June 17, 1930, c. 497, Title IV; 46 Stat. 739; 31 U. S. C. A. § 372) is printed at pages 26-27 of the Petition for Writ of Certiorari, and at pages 6-7 of the Transcript of Record.

Argument

The only question here presented has heretofore been unequivocally determined by this Court, and the decision of the Court of Appeals of New York in this case is in complete accord with the applicable decisions of this Court.

POINT I

This Court has ruled conclusively that a governmental function such as that imposed upon respondent by Section 522(c) of the Tariff Act of 1930 may not be directed or controlled by a State Court.

The Constitution vests exclusively in Congress the power to impose customs duties and the power to regulate the value of foreign coin in terms of money of the United States (Art. I, §§8, 10). In order that the value of imported merchandise expressed in currencies of foreign countries may be converted into currency of the United States for the purpose of the assessment and collection of customs duties, Congress by Section 522 of the Tariff Act of 1930 has directed the Federal Reserve Bank of New York to determine the rates of exchange of the respective currencies of foreign countries daily and to certify such rates to the Secretary of the Treasury. In determining and certifying such rates, therefore, respondent is performing a governmental function pursuant to express direction of Congress in a field in which the Federal Government has exclusive jurisdiction.

This Court has decisively and consistently held that performance of such a function by a Federal agency may not be directed or controlled by a State court. This was first decided in the leading case of *M'Clung* v. *Silliman*, 6 Wheat. 598. The headnote gives the holding of that case as clearly as it could possibly be stated:

> "A State Court cannot issue a mandamus to an officer of the United States."

This decision has been repeatedly followed by this and other courts.

Tarble's Case, 13 Wall. 397 (1872);
Ex Parte Shockley, 17 F. (2d) 133 (D. C. N. D. Ohio 1926);
State ex rel. Wilcox v. *Curtis,* 35 Conn. 374 (1866);
Hinkle v. *Town of Franklin,* 118 W. Va. 586, 191 S. E. 291 (1937);
Goldstein v. *Somervell,* 170 Misc. 602, 10 N. Y. S. 2d 747 (1939);

See

Kendall v. *United States,* 12 Peters 524, 617 (1838);
Territory v. *Lockwood,* 3 Wall. 236, 239 (1866);
In re Blake, 175 U. S. 114, 119 (1899);
United States v. *Owlett,* 15 F. Supp. 736 (1936).

No case has been cited by the petitioner in any of the courts during any stage of this proceeding which has disputed its authority.

The authority of the *M'Clung* case has been consistently recognized and approved by writers of authoritative legal texts. *Willoughby on The Constitutional Law of the United States,* 1929 Edition, Volume I, page 201, says:

> "That a State court has no power to issue a mandamus or writ of certiorari to a Federal officer is not questioned."

See also

Merrill on Mandamus, p. 271;
High on Extraordinary Legal Remedies, (3d ed. 1896) p. 107;
Spelling on Injunctions and Other Extraordinary Remedies, (2d ed. 1901) p. 1268;
Rottschaefer on Constitutional Law, (1939) pp. 111-115.

The petitioner, in an elaborate discussion, undertakes to show that this point was not involved in the Court's holding

and that if it was involved it was a moot question. Any such contention is completely disproved by the unequivocal statement of this Court in *Kendall* v. *United States*, 12 Peters 524, at 617, that in the *M'Clung* case—

> "the only question directly before the Court was, whether a state court had authority to issue a mandamus to an officer of the United States, and this power was denied."

Moreover the mere reading of the opinion in the *M'Clung* case is a complete answer to the petitioner's argument. The majority of the Court of Appeals in its opinion by Chief Judge Lehman gives an analysis of that decision which needs no amplification. Twelve New York judges, including the Special Term judge, five judges in the Appellate Division, and six in the Court of Appeals, who heard this case, evidently concurred in this interpretation of the decision in *M'Clung* v. *Silliman*. So far as we know, only the one dissenting judge in the Court of Appeals and the petitioner have ever expressed a contrary view.

The principle of the *M'Clung* case applies even though the duty of the Federal agent is merely ministerial. In that case this Court clearly indicated that it regarded the duties of the register as ministerial by reference at three points in its opinion to "ministerial officers" (6 Wheaton 599, 600 and 605). Petitioner's repeated characterizations of the duties of respondent in this case as ministerial are therefore wholly immaterial. It seems clear, however, that the duties imposed upon respondent by Section 522(c) of the Tariff Act are not ministerial but require the exercise of judgment, discretion and special knowledge.

There is even more reason today for sustaining the principle laid down by *M'Clung* v. *Silliman* than there was at the time that case was decided. With the ever-increasing number of activities of the Federal Government, with the increase of its departments, bureaus and administrative agencies, utter confusion would result if every State court

in the land could undertake to mandamus Federal officials in the performance of their duties. Certainly no public policy requires a reversal of the principle today. Lehman, Ch. J., succinctly summarized the principle in the last paragraph of his opinion in this case (R. 37):

> "No case has been cited which holds that a State court may go outside that field and control the manner in which a federal agency performs or attempts to perform its functions and duties under the Tariff Act or other federal statute where the Federal government has exclusive jurisdiction. Assumption of such power would hamper orderly government and ignore the division of the fields of government of State and nation created by the Constitution. * * * "

POINT II

In view of the system of customs courts set up by Congress, there is particular reason for not permitting a State court to issue mandamus in this case.

Congress, of course, has exclusive jurisdiction with respect to tariff matters. Congress has set up a comprehensive system of customs courts. (Act of Oct. 10, 1940, c. 843, § 1, 54 Stat. 1101; 28 U. S. C. A. § 296; Act of June 17, 1930, c. 497, Title IV, §§ 514, 515; 46 Stat. 734; 19 U. S. C. A. §§ 1514, 1515; Act of March 3, 1911, c. 231, § 188, 36 Stat. 1143, as amended; 28 U. S. C. A. § 301; Act of August 5, 1909, c. 6, § 28, 36 Stat. 91, 105, as amended; 28 U. S. C. A. § 308.) Their jurisdiction over the administration of matters relating to customs appears to be exclusive. *Patchogue-Plymouth Mills Corporation* v. *Durning,* 101 F. (2d) 41 (C. C. A. 2d 1939); *Cottman Co.* v. *Dailey,* 94 F. (2d) 85, 88 (C. C. A. 4th 1938); *Riccomini* v. *United States,* 69 F. (2d) 480, 484 (C. C. A. 9th 1934); *Gulbenkian* v. *United States,* 186 Fed. 133, 135 (C. C. A. 2d 1911); *Nichols* v. *United States,* 7 Wall. 122, 129-131 (1869). Whether the jurisdiction of such courts is exclusive or not, the remedies

obviously intended to be afforded by them are so broad as to leave no basis for permitting the State courts to invoke the extraordinary remedy of mandamus. It is not only an elementary principle of law, but it is expressly provided in the New York statute, that mandamus cannot be resorted to if the determination can be adequately reviewed by some other court, body or officer (New York Civil Practice Act §1285).

POINT III

Petitioner's claim that if mandamus is not afforded by the State court no other remedy is available is no valid reason for granting this certiorari.

As we have pointed out, the jurisdiction of the customs courts in administering tariff matters is exceedingly broad. They are expressly given jurisdiction to review the validity of any orders or findings entering into the assessment of customs duties (Act of June 17, 1930, c. 497, Title IV, §§ 514, 515; 46 Stat. 734; 19 U. S. C. A. §§ 1514, 1515). The petitioner contends, however, that its only adequate remedy is in the State court. It asserts that the customs courts have no jurisdiction to consider the validity of the rates certified by respondent. There are, to be sure, decisions to the effect that a determination by an executive agency of the rate of exchange entering into a customs assessment is a matter that is nonjusticiable. But these decisions are to the effect that such a determination is nonjusticiable in any court.

Cramer v. *Arthur*, 102 U. S. 612, 616-617 (1880);
Hadden v. *Merritt*, 115 U. S. 25 (1885);
United States v. *Klingenberg*, 153 U. S. 93 (1894);
Amalgamated Textiles, Ltd. v. *United States*, 84 F. (2d) 210 (Cust. & Pat. App. 1936);
J. S. Staedtler, Inc. v. *United States*, T. D. 49255, 25 C. C. P. A. 136 (1937).

A determination which is nonjusticiable may not be reviewed whether the question is presented in a customs court or in a mandamus proceeding in a State court.

POINT IV

The authorities relied upon by petitioner are not in point.

This case is governed by the principle embodied in *M'Clung* v. *Silliman*. The authorities cited by petitioner have no bearing on that principle and are clearly distinguishable from the case at bar. *Armand Schmoll, Inc.* v. *The Federal Reserve Bank of New York*, 286 N. Y. 503, at 508-509 (R. 36-37).

Cases cited by petitioner hold that an action may be brought either in the State or in the Federal courts to enforce private rights created by Federal statute against a person performing no governmental function.[2] This case does not involve such a right. It involves a governmental function conferred by Congress upon an agency of the Federal Government, and none of the cases cited by petitioner even intimates that such a function may be the subject of a mandatory decree of a State court.

Cases involving the jurisdiction of State courts of a quo warranto proceeding[3] to test the right of national banks

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[2] *Claflin* v. *Houseman*, 93 U. S. 130; *Second Employers Liability Cases*, 223 U. S. 1; *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211; *St. Louis B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200; *Galveston etc. Ry. Co.* v. *Wallace*, 223 U. S. 481; *Panama R. R. Co.* v. *Vasquez*, 271 U. S. 557; *Hines* v. *Lowrey*, 305 U. S. 85; *People* v. *Welch*, 141 N. Y. 266; *Guthrie* v. *Harkness*, 199 U. S. 148; *Matter of Tuttle* v. *Iron National Bank*, 170 N. Y. 9; *Matter of Hurley* v. *National Bank of Middletown*, 252 App. Div. 272; *People ex rel. Lorge* v. *Consolidated National Bank*, 105 App. Div. 409; *Murray* v. *Walker*, 156 Ky. 536.

[3] *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 428.

to exercise fiduciary powers as provided in Section 11(k) of the Federal Reserve Act (Act of December 23, 1913, ch. 6, § 11(k); 38 Stat. 251, 262; 12 U. S. C. A. § 248), do not involve any governmental functions of national banks; and are distinguishable also on the ground that the statute permits national banks to exercise such powers only "when not in contravention of state or local law." The question in such cases is, as pointed out by this Court in the very case cited by petitioner, one of State law intended by Congress to be determined in the State courts.

Cases holding that State courts have jurisdiction to give redress for wrongs committed by Federal officers or agents claiming to act under authority granted by Federal statute,[4] or to prevent Federal officers or agents from going outside their Federal statutory authority and jurisdiction,[5] are clearly distinguishable from *M'Clung* v. *Silliman* and from the case at bar. In each of the cases falling in those categories the action of the State court was directed solely at the defendant's acts as an individual outside the scope of his Federal authority, and in no case did the court purport to assume jurisdiction over the acts of the defendant as a Federal officer or agent. In the *M'Clung* case and in the case at bar, on the other hand, the very hypothesis upon which the State court's power was invoked was that the act sought to be directed by order of the State court was an act which respondent should perform within its authority as a Federal instrumentality.

Cases holding that a mandamus proceeding against the holder of a public office abates upon the death or resignation of such officer,[6] do not support petitioner's assertion that

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[4] *Bates* v. *Clark*, 95 U. S. 204; *United States* v. *Lee*, 106 U. S. 196, *Teal* v. *Felton*, 12 How. 284; *Gelston* v. *Hoyt*, 3 Wheat. 246; *De Lima* v. *Bidwell*, 182 U. S. 1; *In re Fassett*, 142 U. S. 479; *Schall* v. *Newton*, 217 App. Div. 171, aff'd 245 N. Y. 576.

[5] *Northern Pacific Ry. Co. and Walker D. Hines, Director General of Railroads* v. *North Dakota*, 250 U. S. 135.

[6] *United States* v. *Boutwell*, 17 Wall. 604; *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Pullman Co.* v. *Croom*, 231 U. S. 571.

this proceeding was not directed against respondent in its official capacity. The order sought in the case at bar would necessarily be directed to respondent in its capacity as agent of the Federal Government because it would require official performance of respondent's statutory duty. By the same token, any order of the State court directing respondent *nunc pro tunc* to certify new and different rates for Brazilian milreis on the dates in question, and therefore disregarding or annulling the action already taken by respondent in discharge of its statutory duty, would clearly constitute a direction of the manner of performance of that duty.

Cases in which petitioner claims Federal courts have issued the writ of mandamus to State officers or agents are not in point.[7] Those cases held simply that where under State practice the recognized method of enforcing a judgment obtained in a State court against a municipality was by mandamus directing an officer to levy a tax to pay the judgment, a nonresident suitor who obtained judgment against a municipality in a Federal court sitting in that State was entitled under the Acts of Congress (1 Stat. 93, 276; 4 Stat. 274; 5 Stat. 499, 789) to the same means of execution. *Amy* v. *The Supervisors*, 11 Wall. 136 (1870); *In re Copenhaver*, 54 Fed. 660 (D. C. W. D. Mo. 1893); *Riggs* v. *Johnson County*, 6 Wall. 166, at 197-198 (1867); *Defoe* v. *Town of Rutherfordton*, 122 F. (2d) 342 (C. C. A. 4th 1941); *Mayor, etc., of The City of Helena* v. *United States ex rel. Helena Waterworks Co.*, 104 Fed. 113, at 117 (C. C. A. 9th 1900). The cases stand for no such broad rule as petitioner contends. *Merrill on Mandamus*, §219.

Section 4 of the Federal Reserve Act (Act of December 23, 1913, ch. 6, §4, 38 Stat. 251; 12 U. S. C. A. §341)

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[7] *Riggs* v. *Johnson County*, 6 Wall. 166; *Supervisors* v. *United States*, 4 Wall. 435; *Von Hoffman* v. *City of Quincy*, 4 Wall. 535; *U. S. ex rel. Ranger* v. *New Orleans*, 98 U. S. 381; *Mobile* v. *Watson*, 116 U. S. 289; *Marion County Court* v. *Huidekoper*, 134 U. S. 332; *Arkansas* v. *St. Louis-S. F. Ry. Co.*, 269 U. S. 172.

which permits respondent and the other Federal Reserve Banks "To sue and be sued, complain and defend, in any court of law or equity", gives to the courts of the State of New York jurisdiction over the *person* of the Federal Reserve Bank of New York in a proper case. It does not, however, invest such courts with jurisdiction over an action or proceeding against the Federal Reserve Bank of New York involving a *subject matter* which is not within their jurisdiction. In an action in a State court to mandamus a Federal agency to perform a Federal function, the court may very well have jurisdiction over the person of the agency but its disability to act arises because of its lack of jurisdiction of the subject matter of the proceeding.

Conclusion

It is respectfully submitted that this Court has not been shown to have jurisdiction to review the decision of the New York Court of Appeals in this case. Even if this Court were shown to have jurisdiction, however, the petition for a writ of certiorari to the Supreme Court of New York should be denied because the decision of the Courts below is clearly in accord with the applicable decisions of this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 928

ARMAND SCHMOLL, INC., PETITIONER

v.

THE FEDERAL RESERVE BANK OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

MEMORANDUM FOR THE UNITED STATES, AMICUS CURIAE

INTEREST OF THE UNITED STATES

This action, in the nature of mandamus, was instituted in the Supreme Court of the State of New York by petitioner for an order directing the respondent, Federal Reserve Bank of New York, to certify to the Secretary of the Treasury, as the value of Brazilian milreis in terms of United States currency on certain dates, the New York market buying rates on those dates for cable transfers payable in Brazilian milreis, in accordance with Section 522 of the Tariff

Act of 1930. The certification of such rates by the Federal Reserve Bank is a governmental function regulated by the statutes of the United States. Accordingly, the Government appeared *amicus curiae* in the courts below to question the jurisdiction of a state court to control the performance of governmental duties by an officer or agency of the United States. It is for the same reason that the United States files this memorandum.

OPINIONS BELOW

The memorandum opinion of the Supreme Court of New York (R. 28–29) is not reported. The order of the Appellate Division (R. 32) was entered without opinion. The opinion of the Court of Appeals of New York (R. 34–52) is reported in 286 N. Y. 503.

JURISDICTION

The order of the Court of Appeals of New York was entered on October 17, 1941 (R. 52–53). The order of the Supreme Court of New York, on remittitur from the Court of Appeals, was entered on October 21, 1941 (R. 53–54). The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Jackson to February 3, 1942 (R. 54), and finally to February 7, 1942 (R. 55). The petition for a writ of certiorari was filed on February 7, 1942.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a state court has power to issue mandamus to a federal instrumentality to control the performance of its governmental duties under federal law.

STATUTE INVOLVED

The applicable portions of Section 522 of the Tariff Act of 1930, 46 Stat. 739, 31 U. S. C., Sec. 372, and of Section 4 of the Federal Reserve Act of 1913, 38 Stat. 254, 12 U. S. C., Sec. 341, are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

Section 522 (a) of the Tariff Act of 1930 provides that the value of foreign coin in terms of United States money shall be estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury quarterly. Section 522 (b) provides that the value so proclaimed shall, except as provided in Section 522 (c), be the basis for converting foreign currency into United States currency whenever necessary for the assessment and collection of import duties. Section 522 (c) provides:

> If no such value has been proclaimed or if the value so proclaimed varies by 5 percentum or more from a value measured by the buying rate in the New York market at noon on the day of exportation, conversion shall be made at a value measured by such buying rate. * * * For the purposes of this subdivision such buying rate shall be the

> buying rate for cable transfers payable in foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury, who shall make it public at such times and to such extent as he deems necessary.

On March 23, 1938, petitioner commenced this proceeding, in the nature of mandamus, in the Supreme Court of New York, New York County, alleging facts which may be summarized as follows:

During January and February 1936 petitioner lawfully imported into the United States certain cattle hides which had been exported from Brazil on December 19, 1935, January 15, 1936, and February 8, 1936 (R. 5). The Collector of Customs, acting within his authority, caused the hides to be appraised, as of the respective dates of exportation, in Brazilian milreis and thereafter converted the appraised value into United States currency and liquidated the duty on the hides at 10 per cent of the converted value (R. 6). In such conversion the Collector used $.083916, $.084200, and $.084700, respectively, as the rate of exchange on each of the three export dates (R. 8, 15). In accordance with Section 522 (c) these rates had been certified by respondent to the Secretary of the Treasury as the buying rates for cable transfers payable in Brazilian milreis, each being certified as "Nominal rate. Firm rates not available" (R. 7-8). Each varied more than 5 per

cent from the rates proclaimed by the Secretary of the Treasury under Section 522 (a) so that the Collector of Customs used the rates certified by respondent to the Secretary in converting the appraised value of the hides (R. 8).

Petitioner also alleged that throughout the months of December 1935 and January and February of 1936 there was an established foreign exchange market in which there were dealings in cable transfers payable in Brazilian milreis and in which firm quotations of the buying rates for such cable transfers were obtainable, the rates on the days in question being $.0555, $.0560, and $.0585 per milreis, respectively (R. 8–9), but that respondent, in complete disregard of Section 522 (c) did not take these sources into consideration when certifying the rates to the Secretary of the Treasury so that the rates certified exceeded the actual rates by 40 percent and were arbitrary, illegal and void (R. 10–11). The liquidation made by the Collector had been set aside on other grounds, it was averred, but the rates certified by respondent would be used by the Collector when the customs duties were finally liquidated so that excess duties of approximately 40 percent would be imposed (R. 12). The petition concluded that petitioner had no other remedy for respondent's refusal to make a new certificate (R. 12–14) and prayed (R. 14):

> That an order be granted directing the defendant to determine and certify to the

> Secretary of the Treasury nunc pro tunc as the value of Brazilian milreis * * * on December 19, 1935, January 15, 1936, and February 8, 1936, the New York market buying rates on said dates for cable transfers payable in Brazilian milreis in terms of currency of the United States, in accordance with the requirements of Section 522 * * *.

Respondent filed, in accordance with local practice, a "Notice of Objections in Point of Law" asking that the petition be dismissed on the grounds (1) that the court is without jurisdiction of the subject-matter, (2) that the petition does not state facts entitling petitioner to relief, (3) that the proceeding was not filed in time, and (4) that the certification can be reviewed by appeal to a court or to some other body or officer (R. 19–20).

The application to dismiss the petition was granted (R. 23–27), and on motion for resettlement of the order of dismissal (R. 23–27) the application was granted "as matter of law only, viz., upon the ground that this Court has not jurisdiction of the subject of this proceeding, and not upon the ground of the exercise of the discretion of the Supreme Court" (R. 4).

On appeal to the Appellate Division of the Supreme Court of New York, First Department (R. 1–2), the order of dismissal was affirmed (R. 32). On appeal to the Court of Appeals of New York (R. 31), the order of the Appellate Division was

affirmed (R. 52–53). The Court of Appeals held (R. 34–37) that the Federal Reserve Bank was a federal agency exercising powers and performing duties imposed by federal statute, and that a state court may not control the manner in which a federal agency performs its functions "under the Tariff Act or other federal statute where the Federal government has exclusive jurisdiction" (R. 37). One judge dissented (R. 37–52).

ARGUMENT

The decision below follows settled principle. This Court early held that state courts are without power to mandamus a federal officer. *McClung* v. *Silliman,* 6 Wheat. 598; see also *In re Blake,* 175 U. S. 114, 119; *Territory* v. *Lockwood,* 3 Wall. 236, 239; *Ex parte Shockley,* 17 F. (2d) 133, 137 (N. D. Ohio); *Hinkle* v. *Town of Franklin,* 118 W. Va. 585, 586. The respondent's corporate authority "to sue and be sued * * * in any court of law or equity" affords no basis of distinction; the rule of the *McClung* case is not based on the government's immunity from suit,[1] but on the principle that the conduct of a federal officer, "can only be controlled by the power that created him." 6

[1] Federal Reserve Act of 1913, 38 Stat. 254, 12 U. S. C., Sec. 341.

An action of mandamus to compel performance of a ministerial duty of a federal officer has been held not to be a suit against the United States. *Board of Liquidation* v. *McComb,* 92 U. S. 531, 541; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386; *Houston* v. *Ormes,* 252 U. S. 469, 472–473.

Wheat. 598 at 604–605; cf. *Tarble's Case,* 13 Wall. 397, 410–411 (*habeas corpus*); *Territory* v. *Lockwood,* 3 Wall. 236, 239–240 (*quo warranto*). The cases of *Federal Housing Authority* v. *Burr,* 309 U. S. 242, and *Federal Land Bank* v. *Priddy,* 295 U. S. 229, holding that federal instrumentalities authorized "to sue and be sued" are subject to garnishment and attachment on money claims, are distinguishable for the same reason; they do not even remotely suggest that state courts may control by mandamus the performance of federal functions entrusted to such agencies.

The petitioner's novel suggestion (Br. pp. 51–55) that the *McClung* case passed only on the merits of the particular claim for relief and that the Court was without power to decide the jurisdictional issue, is in the teeth of the opinion and mandate.[2] The "only question directly before the Court, was, whether a state court had

[2] The Court, after noting that the state court had affirmed its own jurisdiction but had denied relief on the merits and that both parties were thus interested in sustaining the decision on the jurisdictional issue (6 Wheat. at 602), concluded that it was "sanctioned, in referring the decision of the state court, in this case, to the ground on which it ought to have been made, instead of that on which it appears to have been made," and expressly placed its decision upon the sole ground that the state tribunal was without jurisdiction. *Id.*, 604–605. The mandate (*id.*, 605) of affirmance without directions to dismiss is not ambiguous in view of the statement included therein that the state court had "no authority" to issue a mandamus (*id.* 605), and any supposed ambiguity is removed by the unequivocal terms of the opinion.

authority to issue a *mandamus* to an officer of the United States, and this power was denied." *Kendall* v. *United States,* 12 Pet. 524, 617. That this was the import of the decision has never heretofore been doubted. See *Territory* v. *Lockwood,* 3 Wall. 236, 239; *In re Blake,* 175 U. S. 114, 119; *Ex parte Shockley,* 17 F. (2d) 133, 137 (N. D. Ohio); *Hinkle* v. *Town of Franklin,* 118 W. Va. 585, 586.

The rule of the *McClung* case has been accepted as settled doctrine for more than a century (see cases cited, *supra*) and has become deeply imbedded in American jurisprudence. Cf. *Tarble's Case,* 13 Wall. 397, 410–411 (*habeas corpus*); *Territory* v. *Lockwood,* 3 Wall. 236, 239–240 (*quo warranto*). See also authorities collected in *Brooks* v. *Dewar,* No. 718, October Term, 1940, Brief for the Petitioner, pp. 35–39. Nothing in the cases cited by petitioner or in the principles which they announce provides any occasion for reconsidering the rule at this time. Of the cases cited, those involving proceedings in state courts hold that such courts are not without jurisdiction merely because a cause of action arises under federal law;[3] that federal officers are subject

[3] *Claflin* v. *Houseman,* 93 U. S. 130 (suit by assignee in bankruptcy); *Second Employers' Liability Cases,* 223 U. S. 1 (Federal Employers Liability Act); *Galveston, etc. Ry. Co.* v. *Wallace,* 223 U. S. 481 (Carmack Amendment); *Minnesota & St. Louis R. R.* v. *Bombolis,* 241 U. S. 211 (Federal Employers Liability Act); *St. Louis B. & M. Ry. Co.* v. *Taylor,* 266 U. S. 200 (Carmack Amendment).

to actions for damages in state courts for private injuries arising out of conduct unauthorized by valid law;[4] and that certain federal instrumentalities engaged in commercial undertakings are subject to the control of state courts in the performance of duties imposed by state law.[5] Those aris-

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[4] *Gelston* v. *Hoyt*, 3 Wheat. 246, affirming 13 Johns. R. 141 (trespass against collector of customs for illegal seizure of vessel and cargo); *Teal* v. *Felton*, 12 How. 284, affirming 1 N. Y. 537 (trover against postmaster for refusal to deliver newspaper); *Bates* v. *Clark*, 95 U. S. 204 (trespass for illegal seizure of goods, instituted in territorial not state court); cf. *United States* v. *Lee*, 106 U. S. 196 (suit to recover possession of real estate instituted in state court and removed to federal court).

[5] *First National Bank* v. *Missouri*, 263 U. S. 640 (quo warranto); *First National Bank* v. *Union Trust Co.*, 244 U. S. 416 (quo warranto); *Guthrie* v. *Harkness*, 199 U. S. 148 (*mandamus*). In *North Dakota* v. *Northern Pacific Railway*, 250 U. S. 135, the proceeding in the state court to compel the Director General of the Railroads to charge rates prescribed by the local Utilities Commission was based on the ground that Section 10 of the Federal Control Act subjected the rates initiated by the President to review by the Interstate Commerce Commission, the jurisdiction of which was not theretofore exclusive of state authority in matters of intrastate rates, and that Section 15 expressly reserved to the states their existing police power. See 250 U. S. at 145–146, 148–159. The state court undoubtedly had jurisdiction to enforce the Director General's alleged duties under state law under the rule of *First National Bank* v. *Missouri*, *supra*, quite apart from the express provision of Section 10 of the Federal Control Act that "no defense shall be made * * * upon the ground that the carrier is an instrumentality or agency of the Federal Government." Jurisdiction was apparently expressly conceded by all the

ing in the federal courts are even more remote. One group involves mandamus of federal officers by the courts of the District of Columbia,[6] which were created of course under the laws of the United States and which were early held to have power to issue such writs under the Act of February 27, 1801, *Kendall* v. *United States,* 12 Pet. 524, 621–625. Others are instances of mandamus issued by federal courts, in conformity with state practice, to compel state officers to levy taxes to pay federal judgments—a procedure authorized by the Process Acts[7] after jurisdiction has been otherwise acquired.[8] And the remaining group sustains the issuance of federal injunctions to restrain state officers acting in violation of the supreme

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parties in the state courts (see 250 U. S. at 142), and was not controverted in this Court by the appellants. The question whether the action was one against the United States, mooted by way of anticipation in the brief filed as *amici curiae* by the several States and the National Association of Railway and Utilities Commissioners (p. 22) and discussed in the opinion of the Court (p. 152) is, as pointed out above, a separate and distinct issue.

[6] *Wilbur* v. *Krushnic*, 280 U. S. 306, 319; *Garfield* v. *Goldsby*, 211 U. S. 249, 261–2; *Lane* v. *Hoglund*, 244 U. S. 174; *Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638.

[7] 1 Stat. 93, 276; 4 Stat. 274; 5 Stat. 499, 789. Cf. Rev. Stat. sec. 914; F. R. C. P. 81 (b).

[8] *Riggs* v. *Johnson County*, 6 Wall. 166, 188 (73 U. S.); *United States ex rel. Ranger* v. *New Orleans*, 98 U. S. 381; *Mobile* v. *Watson*, 116 U. S. 289; *Marion County Court* v. *Huidekoper*, 134 U. S. 332; *Arkansas* v. *St. Louis-S. F. Ry. Co.*, 269 U. S. 172; *Bath County* v. *Amy*, 13 Wall. 244.

law of the land.[9] In none of these cases was the authority of *McClung* v. *Silliman* ever questioned or limited.

Whether other relief is available to petitioner need not be inquired. If not, it is only because Congress has seen fit to withhold power to issue mandamus from the federal courts outside the District of Columbia. The remedy, if any is desirable, lies with Congress rather than in overturning a principle followed for more than a century and subjecting federal functions to the directions of state courts.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

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MARCH 1942.

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[9] *Allen* v. *Baltimore & O. R. R. Co.*, 114 U. S. 164; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10, 13; *In re Tyler, Petitioner*, 149 U. S. 164; *Scott* v. *Donald*, 165 U. S. 107; *Reagan* v. *Farmers L. & T. Co.*, 154 U. S. 362; *Smythe* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123, 155, 158–159.